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THE SEATTLE SOLUTION: COLLECTIVE BARGAINING BY FOR-HIRE DRIVERS & PROSPECTS FOR PRO-LABOR FEDERALISM

Charlotte Garden *

INTRODUCTION

Well before the 2016 presidential election, worker movements like “Fight for Fifteen” had begun to rack up wins in left-leaning states and cities on issues including the minimum wage and paid sick time. Then the election made necessity out of virtue, with states and cities adopting a key role in resisting policies of the Trump administration. Now, with the Trump National Labor Relations Board and Department of Labor starting to roll back pro-worker gains made during the Obama administration, this emerging progressive federalism has only become more important for improving working conditions and expanding opportunities for workers’ collective action.

This essay focuses on one innovative workers’ rights measure: a Seattle ordinance allowing taxi and for-hire drivers who are classified as independent contractors to unionize and bargain collectively. This law is largely a response to precarious working conditions in the app-based “gig economy,” which depends on an army of workers who are paid by the task and who do not receive protections usually afforded employees.¹ A key idea behind the ordinance – the Seattle solution – is that the most expedient way to improve working conditions for these workers, who are regarded as ineligible for key employment protections yet who are powerless to bargain a better deal on an individual basis, is through increased collective leverage.²

As Part I of this essay discusses, Seattle’s driver bargaining ordinance is considerably more protective of workers’ collective action than the NLRA. Thus, it is possible that even those drivers who are covered by Seattle’s law who should arguably be classified as employees may actually wind up

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¹ See Daniel Beckman, *City Council Member Says Let Uber Drivers Unionize*, THE SEATTLE TIMES, Aug. 31, 2015, <http://www.seattletimes.com/seattle-news/politics/seattle-lawmaker-plans-to-help-for-hire-drivers-unionize/>.

² Seattle, Wash., Ordinance 124968 ¶ I (Dec. 23, 2015) (codified at SEATTLE, WASH., MUN. CODE §§ 6.310.110, 6.310.735 (2017)).

better off than they would be if they challenged their classification as independent contractors, particularly considering the costs and uncertain outcomes of such challenges. However, it is also possible that the ordinance will be struck down, and Part II canvasses pending legal challenges to the Seattle ordinance, which is now temporarily enjoined by the Ninth Circuit.³ Finally, Part III discusses legal and political barriers to the Seattle solution, concluding that they are not insurmountable.

I. THE SEATTLE SOLUTION

In December 2015, the Seattle City Council unanimously passed an ordinance (the “ordinance” or the “driver bargaining ordinance”) creating a collective bargaining system for for-hire drivers who were classified as independent contractors, including both app-based and traditional taxi drivers.⁴ The ordinance was the product of lobbying by Uber and Lyft drivers who were frustrated by capricious treatment by the transportation network companies (TNCs) and taxi dispatchers on which they depended for income.⁵ The drivers – many of whom were from Somali and Sikh immigrant communities – were supported by Teamsters Local 117, which already had experience supporting collective action by drivers classified as independent contractors, including both taxi and TNC drivers.⁶ This section briefly describes the ordinance and illustrates several ways that it is more protective of workers than the National Labor Relations Act (NLRA). It then discusses the ordinance’s somewhat difficult path from unanimous city council vote to rulemaking and the brink of implementation.

A. *The Ordinance*

Much like the NLRA, the ordinance begins with a statement of purpose

³ *Chamber of Commerce v. City of Seattle*, No. 17-35640, at 2 (9th Cir. Sep. 7, 2017) (order granting injunction).

⁴ CB 118499, OFFICE OF THE CITY CLERK (Dec. 14, 2015), <https://seattle.legistar.com/LegislationDetail.aspx?ID=2451983&GUID=E69B3AB7-88E1-491A-A49F-B32BE688D16C&Options=Advanced&Search=> (follow “Action Details” hyperlink for Action By “Full Council” on Dec. 14, 2015).

⁵ Sonia Singh, *Seattle Uber Drivers Win Right to Bargain*, LABOR NOTES (Jan. 28, 2016), <http://www.labornotes.org/2016/01/seattle-uber-drivers-win-right-bargain>.

⁶ Teamsters Local 117 backs both the Western Washington Taxicab Operators Association, and the App-Based Drivers Association. The union describes both groups as “membership association[s] that promote[] fairness, justice, and transparency.” TEAMSTER TAXI, <http://www.teamstertaxi.org/>; App Based Drivers Association, *About Us*, FACEBOOK, https://www.facebook.com/pg/abdaseattle/about/?ref=page_internal. For a description of some of the collective action undertaken by drivers with the support of these groups, see Dawn Gearhart, *Giving Uber Drivers a Voice in the Gig Economy*, in TOWARDS A FAIRER GIG ECONOMY 13 (Mark Graham & Joe Shaw eds., 2017).

grounded in both commercial stability and worker rights. In a representative provision, the ordinance states “[c]ollective negotiation processes in other industries have achieved public health and safety outcomes for the general public and improved the reliability and stability of the industries at issue . . . In other parts of the transportation industry, for example, collective negotiation processes have reduced accidents and improved driver and vehicle safety performance.”⁷ Similar to the NLRA, this introductory language may decrease the likelihood that the ordinance is struck down by a court, a topic discussed in the next section.

Further echoing the NLRA (as well as nearly all public sector US labor law⁸), the ordinance makes an elected union the exclusive representative of the qualifying drivers who work for one enterprise.⁹ In the ordinance’s parlance, labor organizations that seek to represent drivers are called “qualified driver representatives” (QDRs) and a QDR that has been certified as the elected representative of a group of drivers becomes an “exclusive driver representative” (EDR).¹⁰ QDRs must satisfy a minimal list of requirements, including non-profit status, democratic structure, and experience reaching agreements between employers and contractors.¹¹ Organizations that apply and are designated by the city to be QDRs are also required to declare their potential organizing targets within a short window after being approved.¹²

Unlike under the NLRA, QDRs are entitled to receive a list of drivers’ names and contact information from TNCs or taxi companies (“driver coordinators”) at the beginning of the organizing drive.¹³ Then, the QDR has 120 days to solicit drivers’ statements of interest in collective representation by the QDR.¹⁴ At the end of the 120-day period, the city conducts a card check and the QDR becomes an EDR if it has collected statements of interest from a majority of qualified drivers included on the contact list.¹⁵

⁷ Seattle, Wash., Ordinance 124968 ¶ J (Dec. 23, 2015) (codified at SEATTLE, WASH., MUN. CODE §§ 6.310.110, 6.310.735 (2017)).

⁸ Clyde W. Summers, *Exclusive Representation: A Comparative Inquiry Into a “Unique” American Principle*, 20 COMP. LAB. L. & POL’Y J. 47 (1998).

⁹ Seattle, Wash., Ordinance 124968 ¶ I (Dec. 23, 2015) (codified at SEATTLE, WASH., MUN. CODE §§ 6.310.110, 6.310.735 (2017)).

¹⁰ SEATTLE, WASH., MUN. CODE § 6.310.110 (2017).

¹¹ SEATTLE, WASH., MUN. CODE § 6.310.735 ¶ B (2017).

¹² *Id.* ¶ C2.

¹³ *Id.* ¶ D.

¹⁴ *Id.* ¶ F1.

¹⁵ The ordinance does not define qualified driver; the definition adopted in a rulemaking is discussed in the next subsection.

Once an EDR is selected, the ordinance imposes a good faith bargaining requirement; it also lists a handful of mandatory subjects of bargaining, including safety-related measures, pay, and work hours, while allowing other mandatory subjects to be designated through rulemaking.¹⁶ But the bargaining parties are not free to reach any agreement they choose. Rather, once an enterprise and an EDR reach an agreement, they must submit it to the director of the city's Department of Finance and Administrative services; the approval process directs the FAS director to consider whether the agreement will "promote[] the provision of safe, reliable, and economical for-hire transportation services," and permits public hearings on that topic.¹⁷

The ordinance also improves on the NLRA in how it treats negotiations that do not result in an agreement. Whereas the NLRA leaves parties at impasse to resort to their economic weapons, such as strikes & lock-outs, and allows the employer to unilaterally implement its last, best, and final offer, the ordinance allows either party to call for interest arbitration once three months of bargaining has elapsed without agreement.¹⁸ Then, the arbitrator is empowered to impose up to a two-year agreement, subject to city approval.¹⁹

Finally, the ordinance allows for meaningful enforcement and substantial penalties of up to \$10,000 for each day that enterprises or QDRs interfere with or retaliate against drivers who attempt to exercise their rights under the ordinance, or otherwise violate the statute – including by bargaining in bad faith.²⁰ Not only is the city authorized to investigate and pursue alleged violations,²¹ but the ordinance also creates a private right of action and allows attorneys' fees to be awarded.²²

All of these measures should be cause for celebration for unions and worker advocates, many of whom have argued that the NLRA would be more likely to fulfill its mandate – to "encourag[e] the practice and procedure of collective bargaining"²³ – if it mandated card check elections, allowed parties at impasse to participate in interest arbitration, and imposed greater penalties on labor law violators.

There is one aspect of the ordinance, however, that is more controversial

¹⁶ SEATTLE, WASH., MUN. CODE § 6.310.735 ¶ H1 (2017).

¹⁷ *Id.* ¶ H2.

¹⁸ *Id.* ¶ I.

¹⁹ *Id.* ¶ I2.

²⁰ *Id.* ¶¶ K & M1b3.

²¹ *Id.* ¶ M1.

²² *Id.* ¶ M3.

²³ 29 U.S.C. § 151 (2017).

among union advocates: it assumes that drivers are properly classified as independent contractors.²⁴ Of course, that classification will be accurate as to at least some drivers. But even where it is less clear that drivers were properly classified by the enterprises for which they work, it could be that robust collective bargaining rights will lead to contracts that are at least as valuable as statutory employment rights – particularly considering the steep potential enforcement costs associated with those rights. Or, from another perspective, the ordinance gives drivers the bargaining power that independent contractors theoretically have, but that for-hire drivers generally lack absent collective power.²⁵

B. From Enactment to Rulemaking & Implementation

The ordinance was one in a string of recent Seattle laws designed to improve working conditions. Over the last three years, Seattle has begun requiring employers to provide paid “sick and safe” leave,²⁶ created an Office of Labor Standards to target wage theft,²⁷ passed legislation that will raise the minimum wage to \$15/hour,²⁸ and required certain employers to follow fair scheduling practices.²⁹ These improvements – often situated as a necessary response to increasing income inequality and rising rents in booming Seattle – were part of the impetus for the driver bargaining ordinance. As the city council put it in a press release: “Over the past few years, Seattle has implemented ordinances to raise local labor standards that these drivers are exempt from . . . This legislation gives drivers a chance to address these issues in their industry.”³⁰

Nonetheless, the ordinance was not without controversy even within Seattle’s progressive, pro-worker government. Although the ordinance passed the Seattle City Council unanimously, Seattle Mayor Ed Murray refused to sign it, allowing the ordinance to go into effect without his

²⁴ The ordinance exempts any drivers who are classified as employees, so if an NLRB proceeding results in a finding that all or some drivers were misclassified as independent contractors, the effect would be to exclude those drivers from coverage under the ordinance. Alternatively, an enterprise could evade the ordinance by re-classifying its Seattle drivers as employees.

²⁵ See *Cotter v. Lyft*, 60 F. Supp. 3d 1067, 1069 (N.D. Cal. 2015) (observing that Lyft drivers “don’t seem much like independent contractors,” because “[w]e generally understand an independent contractor to be someone with a special skill (and with the bargaining power to negotiate a rate for the use of that skill)”).

²⁶ Seattle, Wash., Ordinance 123698 (Sep. 23, 2011), <http://bit.ly/2vsOcPz>.

²⁷ Seattle, Wash., Ordinance 124645 (Dec. 2, 2014), <http://bit.ly/2vJVMk1>.

²⁸ SEATTLE WASH., MUN. CODE § 14.19.005 *et seq.* (2017).

²⁹ SEATTLE WASH., MUN. CODE § 14.22 (2017).

³⁰ *Council Unanimously Adopts First-of-its-Kind Legislation to Give Drivers a Voice on the Job*, SEATTLE CITY COUNCIL (Dec. 14, 2015, 3:25 PM), <https://www.seattle.gov/council/issues/giving-drivers-a-voice>.

endorsement. In a public statement, Murray praised transportation network companies (“TNCs”) like Uber and Lyft for “providing valuable new tools for city residents and innovating at a tremendous pace,” and criticized the city council for committing Seattle to “relatively unknown costs” associated with administering the ordinance, promulgating rules under it, and then implementing those rules.³¹ Murray elaborated in a letter to city councilmembers, listing cost concerns in more detail and complaining that the bill left key terms – including which drivers would be eligible to bargain collectively – to be defined during a subsequent rulemaking process.³²

Part of Mayor Murray’s reticence may trace back to Seattle’s first attempt to regulate TNCs such as Uber & Lyft, which took place after both companies began operating in the city without authorization. In March 2014, the city council unanimously passed a suite of TNC regulations that capped the number of vehicles per company at 150, in addition to imposing insurance and other safety requirements.³³ That measure proved politically unpopular, and a Lyft- and Uber-funded group collected enough signatures from city residents to force a repeal referendum.³⁴ In light of that reality, Mayor Murray put the ordinance on hold and negotiated directly with the TNCs, ultimately arriving at a watered-down measure that did not include a cap on the number of TNC vehicles.³⁵ TNCs appeared to have become popular enough that elected officials would pay a political price for limiting their operation, or – perhaps worse – for prompting them to pack up and leave Seattle rather than comply with regulation.³⁶

With TNC regulation such a hot-button issue, the rulemaking process required to implement the driver bargaining ordinance became a political hot potato, ultimately extending the implementation timeline by

³¹ Office of the Mayor, *Mayor Comments on TNC Ordinance*, SEATTLE GOV. (Dec. 14, 2015), <http://murray.seattle.gov/mayor-comments-on-tnc-ordinance/>.

³² Letter from Mayor Edward Murray to Seattle City Council (Dec. 14, 2015), <https://www.scribd.com/doc/293295028/Seattle-Mayor-Murray-letter-to-Council-RE-Uber-union-law>.

³³ Seattle, Wash., Ordinance 124441 (Mar. 19, 2014), <http://bit.ly/2vu678g>.

³⁴ Taylor Soper, *Seattle Ride-Sharing Regulations Suspended; Mayor Wants to Negotiate with Stakeholders*, GEEKWIRE (Apr. 17, 2014), <https://www.geekwire.com/2014/ride-sharing-petition-seattle/>.

³⁵ Taylor Soper, *Seattle Legalizes Uber, Lyft to Operate Without Caps*, GEEKWIRE (July 14 2014), <https://www.geekwire.com/2014/seattle-legalizes-uber-lyft-operate-without-caps/>.

³⁶ For a more complete discussion of TNCs’ political strategy, see Elizabeth Pollman & Jordan M. Barry, *Regulatory Entrepreneurship*, 90 S. CAL. L. REV. 383, 383-84 & 386 (2017) (describing how companies like Uber and Lyft avoid regulation, in part by “operating in legal gray areas, growing ‘too big to ban,’ and mobilizing users for political support”).

months. When the ordinance was enacted in December 2015, it designated the city's office of Finance and Administrative Services (FAS) to enact implementing rules by September 2016. In June 2016, FAS began holding hearings aimed at gathering the information it would need to decide which drivers would count as "qualifying drivers" under the ordinance – that is, which drivers would be eligible to vote for union representation. However, FAS quickly concluded that its hearings had not yielded enough information, and sought more time from the city council to complete the rulemaking process. The decision to seek more time would have been unremarkable – except for the fact that FAS and the mayor also demanded that the city council reclaim responsibility for deciding who would be a qualifying driver, and then all but refused to make that politically contentious decision.³⁷ That posture prompted a brief standoff between the two branches of city government, which was ultimately resolved when the city council gave FAS an additional four months to complete rulemaking and pointedly reiterated the driver bargaining ordinance's definition of "qualifying driver," which included a list of factors that FAS was to take into consideration during rulemaking.³⁸

Ultimately, FAS finalized a rule reflecting a compromise position: "qualifying drivers" would include anyone who had initiated a contractual relationship with a driver coordinator at least 90 days before the ordinance's commencement date, and who had driven at least 52 trips "during any three-month period in the 12 months preceding the commencement date."³⁹ In the nature of many compromises, this left both union and enterprise representatives unhappy. Union representatives wanted only full-time drivers, or those who leased or bought cars for the purpose of driving for a

³⁷ Kevin Schofield, *The Uber Driver Union Mess: It All Comes Down to One Question*, SCC INSIGHT (Aug. 23, 2016), <https://sccinsight.com/2016/08/23/the-uber-driver-union-mess-it-all-comes-down-to-one-question/>.

³⁸ Seattle, Wash., Ordinance 125132 (Sep. 22, 2016) (stating that in defining "qualifying driver," FAS "shall consider factors such as the length, frequency, total number of trips, and average number of trips per driver completed by all of the drivers who have performed trips in each of the four calendar months immediately preceding the commencement date, for a particular driver coordinator, any other factors that indicate that a driver's work for a driver coordinator is significant enough to affect the safety and reliability of for-hire transportation, and standards established by other jurisdictions for granting persons the right to vote to be represented in negotiations pertaining to the terms and conditions of employment"). All but the last of those considerations are also listed in the driver bargaining ordinance. SEATTLE, WASH., MUN. CODE § 6.310.110 (2017).

³⁹ Seattle Director of Finances and Administrative Services, Rule FHR-1, Qualifying Drivers and Lists of Qualifying Drivers (May 26, 2017), http://clerk.seattle.gov/~CFs/CF_320270.pdf. The rule permits a 24-month time period for military service members who cannot meet the 12-month requirement because of deployment.

TNC, to be permitted to vote.⁴⁰ Conversely, Uber argued that every driver should be allowed to vote, without regard to how much or little driving they did.⁴¹ The difference between those two positions was considerable, especially considering Uber's assertion that over half of its Seattle drivers worked fewer than ten hours per week.⁴²

As this rulemaking progressed, Uber also launched a "no union" campaign. (This was in addition to Uber's solicitation of drivers to submit comments to FAS arguing that every Uber driver should be allowed to vote in a union election.) Uber's campaign included phone calls to drivers, wherein company representative claimed that "[t]his is simply a case where collective bargaining and unionization do not fit the characteristics of the work," and emphasized differences in how different Uber drivers operated – a rhetorical choice that was not without irony, considering Uber's "every driver votes" position.⁴³ Additionally, Uber created a series of commercials and podcasts to discourage drivers from supporting a union drive, suggesting that collective bargaining might destroy Uber drivers' flexibility, or even drive the company out of business,⁴⁴ and threatened to pull out of Seattle if the ordinance took effect.⁴⁵ And finally, operating on a third front, Uber and Lyft began lobbying the state legislature to divest city authority over TNCs, though that effort seems unlikely to bear fruit.⁴⁶

In May 2017, FAS's regulations were finalized, and Teamsters Local 117 applied for and was granted QDR status; as of this writing, it is the only QDR. Local 117 then declared its organizing targets, including both Lyft and Uber. That declaration should have prompted the named enterprises to turn over lists of qualifying drivers. However, as discussed in

⁴⁰ Mike Richards, *Seattle Push for Uber Union Vote Slowed; Automation is Coming*, *In Time*, LENS (Aug. 29, 2016), <http://thelens.news/2016/08/29/seattle-push-for-uber-union-vote-slowed-automation-is-coming-in-time/>.

⁴¹ *Id.*

⁴² Uber, Call Script, <https://www.documentcloud.org/documents/2729945-Call-Script.html> (last visited Aug. 31, 2017).

⁴³ *Id.*

⁴⁴ Heidi Groover, *As Seattle Uber Drivers Try to Unionize, the Company Doubles Down on a Scare Campaign*, *THE STRANGER* (Dec. 7, 2016), <http://www.thestranger.com/news/2016/12/07/24731875/can-uber-convince-its-drivers-they-dont-need-a-union>.

⁴⁵ Monica Nickelsburg, *Uber GM Says Service May Leave Seattle if Landmark Union Law is Implemented*, *GEEKWIRE* (Mar. 24, 2017), <https://www.geekwire.com/2017/uber-gm-says-service-may-leave-seattle-landmark-union-law-implemented/>.

⁴⁶ Sara Bernard, *Are Uber and Lyft Plotting an End Run on Seattle Regs?*, *SEATTLE WEEKLY* (Feb. 14, 2017), <http://www.seattleweekly.com/news/are-uber-and-lyft-plotting-an-end-run-around-seattle-regs/>.

the next section, the ordinance is presently enjoined.⁴⁷

II. THE SEATTLE SOLUTION IN COURT

To date, corporate and ideological opponents of the ordinance have filed two lawsuits in federal court, and a third in state court.⁴⁸ This section briefly describes the challengers' legal theories. However, the bottom line is this: each case was dismissed at the trial court level, though the plaintiffs in both federal cases recently appealed to the Ninth Circuit.⁴⁹ The ordinance was originally enjoined by the district court pending its decision in the two federal cases; that injunction was lifted when the district court dismissed the second of the two challenges.⁵⁰ As of this writing, the Ninth Circuit has temporarily enjoined the ordinance while it considers the plaintiffs' motion for an injunction pending appeal.⁵¹

The most plausible of the three challenges was filed in federal district court in Seattle by the Chamber of Commerce and Rasier, an Uber subsidiary.⁵² That case raises a number of state and federal claims,⁵³ including that the ordinance is preempted by federal labor and antitrust law.⁵⁴

⁴⁷ *Chamber of Commerce v. City of Seattle*, No. 17-35640, at 2 (9th Cir. Sep. 7, 2107) (order granting injunction).

⁴⁸ *Chamber of Commerce v. City of Seattle* (W.D. Wash. Aug. 1, 2017) (No. 2:17-cv-00370), 2017 WL 3267730; *Clark v. City of Seattle* (W.D. Wash. Aug. 24, 2017) (No. 2:17-cv-00382), 2017 WL 3641908; *Rasier v. City of Seattle* (Wa. Super. Ct. 2017) (No. 17-2-964-4).

⁴⁹ Pls.' Notice of Appeal at 1, *Chamber of Commerce v. City of Seattle* (W.D. Wash. Aug. 1, 2017) (No. 2:17-cv-00370), 2017 WL 3267730; Pls.' Notice of Appeal at 1, *Clark v. City of Seattle* (W.D. Wash. Aug. 24, 2017) (No. 2:17-cv-00382), 2017 WL 3641908.

⁵⁰ *Clark*, 2017 WL 3641908 at 4.

⁵¹ *Chamber of Commerce v. City of Seattle*, No. 17-35640, at 2 (9th Cir. Sep. 7, 2107) (order granting injunction)

⁵² Amended Complaint, *Chamber of Commerce v. City of Seattle* (W.D. Wash. Apr 11, 2017) (No. 17-cv-00370), 2017 WL 1734748. The Chamber of Commerce initially filed suit before FAS had promulgated regulations to implement the ordinance; that complaint was substantively similar to the later one cited above and discussed in this essay, though the later complaint added Rasier as a plaintiff. *Cf.* Complaint, *Chamber of Commerce v. City of Seattle* (W.D. Wash. Mar. 6, 2016) (No. 2:16-cv-00322), 2016 WL 836320. However, the district court dismissed the case on standing grounds, rejecting the Chamber's arguments that its members, including Uber and Washington taxi company Eastside For Hire, were already being injured by the ordinance because they had decided to spend money to discourage drivers from unionizing. *Chamber of Commerce v. City of Seattle* (W.D. Wash. Aug. 9, 2016) (No. C16-0322), 2016 WL 4595981.

⁵³ The state claims are not discussed in this Essay, but arise under the Washington Consumer Protection Act and the Washington Public Records Act.

⁵⁴ Amended Complaint at ¶ 1, *Chamber of Commerce v. City of Seattle* (W.D. Wash. Apr 11, 2017) (No. 17-cv-00370), 2017 WL 1734748.

The premise of the Chamber’s antitrust claim recalls the regulation of collective action in the United States before the Clayton Act’s labor exemption and the Norris-LaGuardia Act.⁵⁵ The Chamber alleges that “[t]he Ordinance unlawfully authorizes for-hire drivers to engage in . . . per se illegal concerted action by forming a cartel (under the aegis of a QDR), speaking as a single unit through an exclusive representative . . . and engaging in horizontal fixing of prices and contractual terms and in horizontal group boycotts.”⁵⁶ The specific antitrust-related harms that the Chamber alleges will result from collective bargaining include higher costs for enterprises (because collective bargaining could result in improved pay and benefits) and consumers (who would be required to pay more for rides and, in the Chamber’s assertion, “receive poorer service,” presumably because a CBA might restrict the number of new drivers, creating longer wait times).⁵⁷

Seattle’s main response (in addition to some justiciability arguments that are beyond the scope of this essay) is that the ordinance meets the requirements of the state action exemption from antitrust law, also known as *Parker* immunity.⁵⁸ *Parker* immunity specifically exempts state sovereign acts from antitrust scrutiny.⁵⁹ But municipalities and other non-

⁵⁵ See Sanjukta M. Paul, *The Enduring Ambiguities of Antitrust Liability for Worker Collective Action*, 47 LOYOLA U. CHI. L.J. 969 (2016); Daniel R. Ernst, *The Labor Exemption, 1908-1914*, 74 IOWA L. REV. 1151, 1152-55 (1989); WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991).

⁵⁶ Amended Complaint at ¶ 60, *Chamber of Commerce of the U.S. v. City of Seattle* (W.D. Wash. Apr 11, 2017) (No. 17-cv-00370), 2017 WL 1734748.

⁵⁷ *Id.* ¶ 64.

⁵⁸ In addition, one might argue that the Clayton Act’s labor exemption, 15 U.S.C. § 17 (2017), applies. The labor exemption states that “[n]othing contained in the antitrust laws shall be construed to forbid the existence and operation of labor . . . organizations, instituted for the purposes of mutual help . . . or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof.” Dmitri Iglitzin and Jennifer L. Robbins have made a narrow argument for application of the labor exemption, arguing that “labor organizations bargaining on behalf of for-hire drivers pursuant to local legislation will be immune from antitrust liability if there is wage competition between drivers operating as independent contractors for TNCs” and union-represented drivers who qualify as employees. Dmitri Iglitzin & Jennifer L. Robbins, *The City of Seattle’s Ordinance Providing Collective Bargaining Rights to Independent Contractor For-Hire Drivers: An Analysis of the Major Legal Hurdles*, 38 BERKELEY J. EMP. & LAB. L. 49, 57 (2017). However, that argument depends on the existence of unionized, employee drivers who are competing with TNC drivers – a premise that will fail in many cities. Others have attempted broader arguments that the labor exemption should cover worker collective action, even if the workers at issue are independent contractors, or that the boundaries of Section 1 of the Sherman Act should be interpreted more narrowly. See, e.g., Paul, *supra* note 55 at 1040.

⁵⁹ *Parker v. Brown*, 317 U.S. 341, 352 (1943).

sovereign actors that exercise delegated authority face a more exacting test – they must show that their anticompetitive policy is both “one clearly articulated and affirmatively expressed as state policy” and “actively supervised by the State itself.”⁶⁰

Washington law contains a broad and explicit grant of authority to municipalities to regulate for-hire vehicles and taxis in ways that displace competition.⁶¹ It also authorizes municipalities to regulate both taxis and for-hire drivers by “regulating entry” into the business, imposing license requirements, controlling rates and methods of payment, regulating routes, requiring safety or insurance requirements, and enacting “any other requirements adopted to ensure safe and reliable taxicab service.”⁶² Accordingly, the district court concluded that the “clear articulation” prong of the *Parker* immunity test was satisfied: first, Washington law expressly incorporates the idea of displacing competition; and second, it authorizes the ordinance’s particular method of regulation – collective bargaining – because it permits “any” requirement adopted in the service of safety and reliability. On that point, it likely helped that the driver bargaining ordinance references links between collective bargaining, driver safety, and reliability, including the assertion that bargaining could “help ensure that the compensation drivers receive for their services is sufficient to alleviate undue financial pressure to provide transportation in an unsafe manner.”⁶³ Uber’s recent bad press, including stories about drivers sleeping in their cars and working dangerously long shifts,⁶⁴ may have also persuaded the court that the ordinance was connected to safety. During oral argument, the court referenced a recent New York Times story about Uber’s use of psychological tools that encourage drivers to spend more time behind the wheel.⁶⁵

⁶⁰ *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985); *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

⁶¹ WASH. REV. CODE §§ 81.72.200, 46.72.001 (2017) (providing, with respect to both taxis and for hire vehicles, that “it is the intent of the legislature to permit political subdivisions of the state to regulate for hire transportation services without liability under federal antitrust laws.”).

⁶² WASH. REV. CODE §§ 46.72.160, 81.72.210 (2017).

⁶³ Ordinance ¶ I.

⁶⁴ See, e.g., Diana Kruzman, *Some Uber Drivers Work Dangerously Long Shifts*, USA TODAY (July 10, 2017 9:34 AM), <https://www.usatoday.com/story/money/cars/2017/07/10/some-uber-drivers-work-dangerously-long-shifts/103090682/>; Carolyn Said, *Long-Distance Uber, Lyft Drivers’ Crazy Commutes, Marathon Days, Big Paychecks*, S.F. CHRON. (Feb. 18, 2017), <http://www.sfchronicle.com/business/article/Long-distance-Uber-Lyft-drivers-crazy-10942919.php>.

⁶⁵ Noam Scheiber, *How Uber Uses Psychological Tricks to Push its Drivers’ Buttons*,

Next, the district court held that the second prong of the *Parker* immunity test was also satisfied because the ordinance requires the FAS director to approve any collective bargaining agreements resulting from the ordinance.⁶⁶ The court rejected the Chamber's arguments that *Parker* immunity requires state (rather than municipal) oversight, and that it was insufficient for the FAS director to review only the final product of bargaining but not the details of the organizing drive and subsequent bargaining process.⁶⁷

Other federal claims in the Chamber's suit involved labor preemption. Specifically, the Chamber argued for the application of both *Machinists* preemption, which displaces states' regulation of conduct that the NLRA left to the "free play of economic forces,"⁶⁸ and *Garmon* preemption, which displaces states' regulation of conduct that is covered or "arguably" covered by the NLRA.⁶⁹

The Chamber pushed its *Machinists* argument much harder than its *Garmon* argument. The *Machinists* argument relies on the Taft-Hartley Act's exclusion of independent contractors from NLRA coverage.⁷⁰ The Chamber's argument extrapolates from that exclusion to conclude that Congress intended that "independent contractors should be unregulated and excluded . . . from collective bargaining agreements" in general – not just from those governed by the NLRA.⁷¹ But that argument also would require the court to accept that Congress intended to treat independent contractors differently than other groups of workers who are explicitly excluded from NLRA coverage, such as public and agricultural workers, but who may nonetheless unionize under state law. In support of this conclusion, the Chamber argued that independent contractors resembled supervisors, who were also excluded from NLRA coverage by the Taft-Hartley Act, and to whom *Machinists* preemption does apply.⁷² The district court characterized that argument as a "coincidence of timing," and concluded that independent contractors are more analogous to public employees and agricultural

N.Y. TIMES (Apr. 2, 2017), https://www.nytimes.com/interactive/2017/04/02/technology/uber-drivers-psychological-tricks.html?_r=1.

⁶⁶ Chamber of Commerce v. City of Seattle (W.D. Wash. Aug. 1, 2017) (No. 2:17-cv-00370), 2017 WL 3267730 at *6-7.

⁶⁷ *Id.*

⁶⁸ *Machinists v. Wisc. Emp't Relations Comm'n*, 427 U.S. 132, 140 (1976).

⁶⁹ *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959).

⁷⁰ 29 U.S.C. § 152(3) (2017) ("The term 'employee' . . . shall not include any individual . . . having the status of an independent contractor.").

⁷¹ Amended Complaint at ¶ 77, Chamber of Commerce v. City of Seattle (W.D. Wash. Aug. 1, 2017) (No. 2:17-cv-00370), 2017 WL 3267730 at *11.

⁷² *Id.*

workers than to supervisors.⁷³

The Chamber's *Garmon* preemption claim is particularly cynical, because it forces the Chamber to argue TNC and taxi drivers arguably are employees under the NLRA.⁷⁴ Of course, TNCs have vehemently denied that their drivers are employees in countless other forums.⁷⁵ This position leaves the Chamber to walk a fine line, focusing on the idea that an NLRB regional director or general counsel could make an (erroneous) argument that drivers were employees. The tightrope act that this position requires may explain why the Chamber did not attempt to advance its *Garmon* claim during oral argument – but in any event, the district court found that because “[n]either the Chamber nor the individual plaintiff has made even a bare assertion that for-hire drivers are employees . . . the Chamber’s claim of *Garmon* preemption is not tethered to the facts alleged.”⁷⁶

The second federal suit challenging the ordinance, *Clark v. Seattle*, was filed by a group of drivers represented by the Freedom Foundation and the National Right to Work Legal Defense Foundation.⁷⁷ The *Clark* complaint alleges that the ordinance violates or is preempted by the NLRA and that it violates the First Amendment.⁷⁸

The *Clark* plaintiffs argue that the ordinance is inconsistent with Sections 8(e) and 8(b)(4) of the NLRA, which respectively prohibit “hot cargo” agreements and certain secondary activity by labor organizations.⁷⁹ The plaintiffs’ arguments under the two NLRA provisions are fundamentally similar: both boil down to allegations that exclusive representation under the ordinance arguably violates the NLRA by

⁷³ Chamber of Commerce v. City of Seattle (W.D. Wash. Aug. 1, 2017) (No. 2:17-cv-00370), 2017 WL 3267730 at *11 (concluding that supervisors were excluded from the NLRA because their unionization “was deemed a threat to the very purposes of the Act as well as the interests of both labor and management,” whereas the exclusion of independent contractors “was added to correct an NLRB interpretation that had wandered from Congress’ original intent”).

⁷⁴ Amended Complaint at ¶¶ 82, 86, Chamber of Commerce v. City of Seattle (W.D. Wash. Aug. 1, 2017) (No. 2:17-cv-00370), 2017 WL 3267730 at *11.

⁷⁵ See generally O’Connor v. Uber Tech., 82 F. Supp. 3d 1133 (N.D. Cal. 2015) (denying that drivers are employees in federal court); Berwick v. Uber Tech., 2015 WL 4153765 (Cal. Dept. Lab.) (denying that drivers are employees in Cal. Dept. of Labor adjudication); Aslam v. Uber BV [2017] I.R.L.R 4 (Oct. 28, 2016) (denying that drivers are workers in London, UK Employment Tribunal).

⁷⁶ Chamber of Commerce, 2017 WL 3267730, at*9.

⁷⁷ Complaint, Clark v. City of Seattle (W.D. Wash. Mar. 10, 2017) (No. 2:17-cv-00382).

⁷⁸ *Id.* ¶ 5.

⁷⁹ The Clark plaintiffs also set forth a claim based on the Driver’s Privacy Protection Act, though that claim is not discussed in this Essay.

precluding companies from contracting with drivers under conditions other than those established in the relevant collective bargaining agreements.⁸⁰

The plaintiffs' First Amendment arguments are conceptually related to the NLRA claims. They argue, first, that the exclusive representation system violates drivers' rights of free speech and association by requiring them to work under a negotiated agreement and precluding them from attempting to negotiate their individual bargains.⁸¹ Second, they argue that the ordinance's provision allowing EDRs and driver coordinators to enter an agreement requiring drivers to become members of the EDR violates the First Amendment.⁸²

The district court concluded that all of these claims were premature, because they depend on the content of an as-yet hypothetical agreement between an EDR and a driver coordinator, or on a labor organization engaging in as-yet hypothetical secondary activity.⁸³ In addition, the court wrote that the NLRA claims would likely fail because an EDR certified under the ordinance would not qualify as a "labor organization" subject to the NLRA's unfair labor practice provisions, because by definition it would not represent any employees covered by the Act. Regarding the plaintiffs' First Amendment claims, the court concluded that the ordinance's exclusive representation provision does not interfere with drivers' freedom of expression, because drivers remain free to form any advocacy group or advance any argument they wish (though the ordinance would preclude the driver coordinators from striking a bargain with a group other than an EDR).⁸⁴ Finally, the court concluded that the drivers' other First Amendment claim was premature, because it was based on the as-yet-

⁸⁰ Complaint at ¶ 65, *Clark v. City of Seattle* (W.D. Wash. Mar. 10, 2017) ("A driver coordinator . . . would arguably violate NLRA Section 8(e) if it entered into an agreement with a labor organization whereby the driver coordinator agreed to cease doing business with independent contractors, drivers not represented by that labor organization, and/or not subject to its collective bargaining agreements."); Complaint at ¶ 69, *Clark v. City of Seattle* (W.D. Wash. Mar. 10, 2017) ("A labor organization would arguably violate NLRA Section 8(b)(4) if it threatened, coerced, or restrained drivers or driver coordinators . . . with the goal of forcing and/or requiring: (1) self-employed drivers to join the labor organization; (2) driver coordinators to cease doing business with drivers not represented by that labor organization and/or not subject to its agreements").

⁸¹ *Id.* ¶ 6 ("An EDR's authority under the Ordinance to act as the sole and exclusive representative of drivers also prohibits or restricts drivers from speaking and contracting with driver coordinators regarding the terms of their business relationship individually").

⁸² *Id.* ¶ 77.

⁸³ *Clark v. City of Seattle* (W.D. Wash. Aug. 24, 2017) (No. 2:17-cv-00382), 2017 WL 3641908.

⁸⁴ *Id.* at *3. Here, the court noted that other courts had universally rejected similar challenges to exclusive representation of "partial" public employees.

unrealized possibility that an EDR and driver coordinator might negotiate a union security clause.⁸⁵

The third suit did not challenge the ordinance itself, but rather FAS's implementing rules, and it was filed in King County Superior Court by Uber subsidiary Rasier.⁸⁶ Rasier argued that the FAS's decision to engage in a series of rulemakings on different aspects of the ordinance, instead of a single rulemaking on every aspect, violated Washington law. Additionally, Rasier argued that FAS's decision to exclude certain drivers from a union election was arbitrary and capricious. The trial court rejected each of these arguments, emphasizing agencies' broad latitude under Washington law.

III. EXPORTING THE SEATTLE SOLUTION?

This section looks beyond the specific legal challenges to the ordinance and discusses three broader legal and political concepts: first, the importance of the ordinance's novelty; second, the role of potential harm to consumers; and third, the difficulty in deciding which drivers should be able to participate in a union election. It concludes on two optimistic notes, despite the possibility that the lawsuits discussed in the previous section may ultimately prove successful. First, even if the Chamber's antitrust claim (which I view as the most serious challenge to the ordinance⁸⁷) ultimately succeeds, a legislative fix will likely be possible. Second, recent events suggest that the political barriers to this type of regulation at the municipal level are receding.

A. Does the Ordinance's Novelty Help or Hurt?

Nearly all press accounts of the Seattle ordinance include a focus on its novelty – it has been described as the nation's "first of its kind" in many stories.⁸⁸ In one sense, that characterization is entirely fair – the ordinance is the first significant modern attempt by a state or local government to create

⁸⁵ *Id.*

⁸⁶ Complaint, Rasier v. City of Seattle (Wash. Super. Ct. 2017) (No. 17-2-964-4).

⁸⁷ The district court reached the same conclusion in granting the Chamber's motion for a preliminary injunction. Chamber of Commerce v. Seattle (W.D. Wash. April 4, 2017) (No. C17-0370RSL) (order granting preliminary injunctive relief) (concluding that the Chamber of Commerce "raised serious questions" regarding its antitrust claims, but that it was not likely to succeed on its other claims).

⁸⁸ *E.g.*, Daniel Beekman, *Judge Tosses U.S. Chamber's Suit Against Seattle Over Uber Union Law, Calling it Premature*, THE SEATTLE TIMES (Aug. 9, 2016), <http://www.seattletimes.com/seattle-news/politics/judge-tosses-chambers-suit-against-seattle-over-uber-law/>; Nick Wingfield & Mike Isaac, *Seattle Will Allow Uber and Lyft Drivers to Form Unions*, N.Y. TIMES (Dec. 14, 2015), <https://www.nytimes.com/2015/12/15/technology/seattle-clears-the-way-for-uber-drivers-to-form-a-union.html?mcubz=3>.

a collective bargaining framework for low-wage independent contractors within an industry. But while the ordinance is new, the strategy is familiar: the response to the increased prevalence of precarious work and fissured workplaces has often been the adoption of sub-federal level collective bargaining rights for workers left uncovered by the NLRA.⁸⁹ Unions in other cities have recently sought to assist TNC drivers in negotiating with enterprises, either on a voluntary “consultation” basis or under the NLRA.⁹⁰ Thus, Seattle’s innovation is to combine these existing developments into a single approach to improve working conditions in the taxi and TNC industry.

Both sides in the *Chamber v. Seattle* litigation attempted to make a virtue out of the ordinance’s novelty. At oral argument, the City Attorney invoked the metaphor of states and localities as “laboratories of experimentation” in arguing for deference to the city’s legislative determinations. But the plaintiffs’ (anti-)novelty arguments were much more extensive. First, they made a novelty argument premised on the nature of TNCs themselves, repeating the oft-debunked claim that app-based TNCs are not for-hire transportation businesses at all, but are instead providers of new technologies that “are no more subject to regulation [under state law authorizing municipal regulation of for-hire driving] than the manufacturer of a GPS device would be if a driver happened to use it when offering rides.”⁹¹ Appropriately, that claim failed, as it did in other cases in

⁸⁹ In another relatively recent example, a list of states have created a mechanism for government-funded home healthcare workers or childcare workers to bargain collectively over employment conditions set by the state. As the district court observed, some of the legal challenges to the ordinance – especially the *Clark* plaintiffs’ First Amendment claims – were similar to challenges to homecare and childcare unionization statutes. *Clark v. Seattle* (W.D. Wash. Aug. 24, 2017) (No. 2:17-cv-00382), 2017 WL 3641908 at *3. Of course, one of those challenges resulted in the Supreme Court decision in *Harris v. Quinn*, 134 S.Ct. 2618, 2634 (2014), where the Court relied on the underlying statute’s novelty as a basis to distinguish and criticize *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977).

⁹⁰ For example, the International Association of Machinists and Aerospace Workers backs the Independent Drivers Guild represents New York TNC drivers, but does not engage in formal collective bargaining with enterprises. Noam Scheiber, *Uber has a Union of Sorts, but Faces Doubts on its Autonomy*, N.Y. TIMES (May 12, 2017), https://www.nytimes.com/2017/05/12/business/economy/uber-drivers-union.html?mcubz=3&_r=0. That arrangement followed an abortive attempt by the International Brotherhood of Electrical Workers, Local 1430, to petition for an NLRB election for a group of LaGuardia-based Uber drivers. RC Petition, Case No. 29-RC-168855 (Feb. 2, 2016), <https://onlabor.org/wp-content/uploads/2016/02/PET.29-RC-168855.Initial20Petition.pdf>.

⁹¹ *Chamber of Commerce v. City of Seattle* (W.D. Wash. Aug. 1, 2017) (No. 2:17-cv-00382), 2017 WL 3267730 at *5.

which it was attempted.⁹²

Second, the plaintiffs made an argument based on the purported novelty of using collective bargaining as a method to regulate taxis and for-hire drivers. That argument, like the one discussed in the previous paragraph, was aimed at defeating the city's *Parker* immunity defense by establishing that Washington law – in particular, the provision allowing municipalities to adopt “any other requirements adopted to ensure safe and reliable for hire vehicle transportation service” – did not authorize the ordinance. Although it ultimately rejected the argument, the district court raised the same question in its decision to preliminarily enjoining the ordinance.⁹³ The danger is that this argument, which has parallels to the anti-novelty rhetoric that has taken hold in constitutional law,⁹⁴ might lead courts to adopt a kind of clear statement rule when assessing whether state law authorizes municipalities to adopt collective bargaining statutes similar to the Seattle ordinance.

But that approach would be wrong for two reasons. First, it is ahistorical. Examples abound in which legislatures implemented collective bargaining schemes in order to improve the functioning of particular industries, in both the public and private sectors.⁹⁵ Thus, there is no reason that courts should be especially skeptical of the idea that a statute authorizing municipal regulation of an industry would include authorization to regulate via a system of collective bargaining.

Second, collective bargaining – with its often-adversarial nature – is unlikely to lead to unfair self-dealing of the type that has led the Supreme Court to tighten *Parker* immunity's requirements in recent cases.⁹⁶ For example, in the Supreme Court's most recent *Parker* immunity case, *North Carolina State Board of Dental Examiners v. FTC*, the Court reasoned that “[l]imits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern.”⁹⁷ That case involved a

⁹² E.g., *O'Connor v. Uber Techs.*, 82 F. Supp. 3d 1133 (N.D. Cal. 2015).

⁹³ *Chamber of Commerce*, 2017 WL 3267730, at *4.

⁹⁴ See generally, Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407 (2017).

⁹⁵ See, e.g., *Carter v. Carter Coal Co.*, 298 U.S. 238, 279 (1936) (discussing legislative purpose of bituminous coal conservation act); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 29 (1937) (discussing the NLRA); JOSEPH SLATER, *PUBLIC WORKERS: GOVERNMENT EMPLOYEE UNIONS, THE LAW, AND THE STATE, 1900-1962* (2004) (discussing adoption of public sector labor law).

⁹⁶ See generally Rebecca Haw Allensworth, *The New Antitrust Federalism*, 102 VA. L. REV. 1387 (2016) (tracing the recent history of *Parker* immunity).

⁹⁷ *North Carolina State Bd. of Dental Examiners v. FTC*, 135 S.Ct. 1101, 1111 (2015);

board comprised primarily of active market participants, who were empowered to unilaterally drive out other market participants.⁹⁸ But the collective bargaining envisioned by the Seattle ordinance works much differently, allowing workers to exercise countervailing power against large enterprises but without power to set any working condition unilaterally.⁹⁹

Still, it would be naïve to say that the lawsuits discussed in this essay pose no threat to the ordinance, or that other states and cities considering similar legislation would not risk litigation costs were they to follow Seattle's lead – one double-edged feature of the *Parker* immunity defense is that a decision on what anticompetitive measures are authorized by Washington will not necessarily translate to California or New York. Moreover, the current Supreme Court is likely to be hostile to novel forms of workers' collective action, and even aside from that, the Court may continue to narrow the scope of *Parker* immunity. However, if a court ultimately finds the Seattle ordinance is not entitled to *Parker* immunity, there still remains the possibility of a legislative fix. Such a fix would have to take place at the state level if a court concludes that Washington did not clearly articulate a policy of displacing competition through collective bargaining, or that the state (rather than the city) must supervise the results of drivers' bargaining under the ordinance. While perhaps politically difficult, this legislative door would remain open.

B. Will the Ordinance Help or Hurt Consumers?

As discussed above, TNCs have argued against the Seattle ordinance (both in the political sphere and in court) on the basis that it could hurt consumers. For example, in its complaint, the Chamber of Commerce alleged that collective bargaining might make Uber unprofitable in Seattle, implying that it might abandon it as a market.¹⁰⁰ Outside of litigation, it has made that threat explicitly.¹⁰¹ Additionally, the Chamber of Commerce's antitrust case includes allegations that consumers could be harmed by the ordinance even if Lyft and Uber do not totally shut down in Seattle, if a

see also id. (arguing that the Supreme Court's approach in recent antitrust cases "help[s] curb anticompetitive rent seeking made inevitable by industry self-regulation").

⁹⁸ *North Carolina State Bd. of Dental Examiners*, 135 S.Ct. at 1108 (explaining that the challenged Board of Dental Examiners was comprised mostly dentists who charged "substantial fees" for teeth whitening services, and who acted to drive non-dentists who engaged in teeth whitening from the market).

⁹⁹ See Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245, 255 (1987) (describing view that collective bargaining can be efficient because it allows workers to exercise countervailing power).

¹⁰⁰ Amended Complaint at ¶ 57, *Chamber of Commerce v. City of Seattle* (W.D. Wash. Aug. 1, 2017) (No. 2:17-cv-00370), 2017 WL 3267730.

¹⁰¹ Nickelsburg, *supra* note 45.

collective bargaining agreement caps the number of drivers for a particular enterprise.¹⁰²

Each of these claims seems to rest on a questionable foundation. For example, Uber's threats that it will abandon Seattle if collective bargaining renders it unprofitable are unconvincing in light of recent media reports that Uber as a company is already operating at an overall loss.¹⁰³ Likewise, the suggestion that collective bargaining might lead to a cap on the number of new TNC drivers also seems implausible. First, "number of drivers" is not a mandatory subject of bargaining under the ordinance; while that fact does not rule out the possibility that bargaining on that issue could occur, it certainly is not obvious that it will. Second, the FAS director is charged with reviewing proposed collective bargaining agreements according to criteria that include the agreements' affects on consumers – so a cap on new drivers that would decrease TNC availability would likely be rejected.¹⁰⁴ Beyond that, drivers could more directly address the problem of their low effective hourly rates by seeking minimum-pay guarantees during bargaining.¹⁰⁵ Conversely, a collective bargaining agreement that improves drivers' take-home pay and makes other improvements is likely to lead existing drivers to spend more time driving while also encouraging more people to sign up to drive.

Still, TNCs (and others) have been effective at conveying the message that industry regulation is bad for consumers, and elected officials may reasonably fear that regulation will have negative political consequences. But here again, the Seattle example suggests that there is reason for

¹⁰² See Amended Complaint at ¶ 64, *Chamber of Commerce v. City of Seattle* (W.D. Wash. Aug. 1, 2017) (No. 2:17-cv-00370), 2017 WL 3267730; see also *supra* note 57 and accompanying text.

¹⁰³ Mike Isaac, *Uber Limits Loss to \$708 Million in First Quarter*, N.Y. TIMES (May 31, 2017), https://www.nytimes.com/2017/05/31/technology/uber-limits-loss-to-708-million-in-first-quarter.html?mcubz=3&_r=0.

¹⁰⁴ Seattle Director of Finances and Administrative Services, Rule FHDR-6, Approval of an Agreement, Changes to an Existing Agreement, and Withdrawal of an Existing Agreement at *2 (May 26, 2017), http://clerk.seattle.gov/~CFs/CF_320275.pdf.

¹⁰⁵ The FTC recently settled a complaint with Uber alleging that the company had misled drivers about their likely earnings potential. FTC, *Uber Agrees to Pay \$20 Million to Settle FTC Charges That It Recruited Prospective Drivers with Exaggerated Earnings Claims*, Jan. 19, 2017, <https://www.ftc.gov/news-events/press-releases/2017/01/uber-agrees-pay-20-million-settle-ftc-charges-it-recruited>. And recent media accounts have reflected some for-hire drivers' complaints that their take-home pay is well below their expectations. *E.g.*, Laura Sydell, *Survey Finds Lyft Drivers Happier Than Uber, Though Pay Has Declined*, NPR (Jan. 21, 2017), <http://www.npr.org/sections/alltechconsidered/2017/01/21/510479642/survey-finds-lyft-drivers-happier-than-uber-though-pay-has-declined> (reporting that "price drops" for TNC fares "are taking their toll on drivers who must work longer hours to make a living wage").

optimism. First, there is the fact that although the city's first attempt to regulate TNCs was met with a successful referendum petition, the driver bargaining ordinance was not. This is likely due to two factors – first, growing acceptance that TNCs should be regulated; and second, a public sense that the ordinance's goals – protecting TNC workers rather than taxi monopolies – were legitimate.¹⁰⁶ As evidence of this dynamic, both recent mayoral candidates pledged to facilitate collective bargaining by more workers, suggesting that Seattle's new mayor, Jenny Durkan, will not share former mayor Murray's reticence regarding the ordinance.¹⁰⁷

C. Who Should Vote in the Gig Economy?

Any attempt to facilitate collective bargaining by app-based workers is likely to encounter controversy over the issue of which workers should vote, especially when the results affect conditions for all workers on a given platform. On one hand, there is appeal to the position that full enfranchisement is the most democratic solution: everyone who works for a platform, even if they work only a minimal amount, should have a say in their working conditions. On the other hand, that rule could present an insurmountable organizing challenge, allowing workers who spend very little time working on a particular platform to control working conditions for those who work full-time. In addition, as the case of the Seattle ordinance illustrates, any decision to allow fewer than all workers to vote is likely to result in legal challenges under state administrative procedures laws. One middle-ground position might be to establish a proportional voting system, in which workers receive additional votes based on the amount of time they have worked on a platform in a given period of time leading up to the election. But that scheme could be difficult to administer. Ultimately, there is no perfect answer to this question, and the most intuitive system – universal voting – could render union rights illusory.

CONCLUSION

A prediction: within the next three years, there will be low-wage independent contractors who are unionized under state or local law. This is not to say progress will be easy; Uber and other TNCs, as well as other

¹⁰⁶ See Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 120-21 (2016) (arguing that “[w]hile consumers largely benefit from requiring platform transportation companies to have similar safety and insurance standards as taxis, the same is not true about restrictions on prices, routes, and entry”).

¹⁰⁷ Heidi Groover, *Jenny Durkan and Cary Moon Support Domestic Worker's Bill of Rights*, THE STRANGER (Sep. 1, 2017), <http://www.thestranger.com/slog/2017/09/01/25389816/jenny-durkan-and-cary-moon-propose-domestic-workers-bill-of-rights>.

types of entities that rely on independent contractors, have every incentive to engage in prolonged litigation and to run aggressive anti-union campaigns. And early losses could deplete the political will that this project requires. Still, the formula is already apparent: progressive states and cities will respond to workers' protest against intolerable working conditions by facilitating collective bargaining, a solution that is simultaneously novel and tried-and-true.